Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 220.

WILLIAM S. ELDER, as Administrator, etc., *et al.*,

Plaintiffs in Error,

vs.

THE HORSESHOE MINING & MILLING CO., *et al.*,

In error to the Supreme Court of the State of South Dakota.

BRIEF OF PLAINTIFFS IN ERROR.

Martin Mason

Attorneys for Plaintiffs in Error.

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STATEMENT.

Plaintiffs in error brought this action in the State Court alleging that their intestate and ancestor, Rufus Wilsey, together with one C. H. Havens on Jan. 21, 1878, entered upon the unappropriated mineral lands of the United States and "duly located and appropriated under the mining laws of the United States and of the Territory of Dakota, the Golden Sand lode or mining claim." That "said locators, Wilsey and Havens, during the lifetime of said Wilsey, performed all work and labor required under the laws of the United States and of the Territory of Dakota for the development and holding of said property

and the protection and perfection of title thereto" and that "all things required under the laws of the United States and of the territory of Dakota and the state of South Dakota to perfect and protect title to said property have been done and performed from time to time as required by law"; (Trans. p. 1, fol. 2) and that the plaintiffs are now the owners and entitled to the possession of an undivided one-half interest in said property; that the defendant, Company claims to be the owner of such half interest by reason of a certain conveyance to it from the original locator, C. H. Havens, and by reason of certain patent proceedings prosecuted by the Company whereby it obtained United States patent to the premises under the name of the "North" lode; plaintiffs pray that the defendant Company be decreed to hold in trust for the plaintiffs an undivided one-half interest in the land embraced in the "North" location, and to convey the same to the plaintiffs. The defendant Company admitted the taking by it of a deed from C. H. Havens, purporting to convey the entire "Golden Sand" claim, and alleging that Havens had theretofore acquired the half interest formerly belonging to Rufus Wilsey by reason of certain forfeiture proceedings taken by Havens against Wilsey for the latter's alleged failure to perform his share of the annual representation work upon the claim during the years 1880 to 1888, inclusive. (Trans. p. 6.)

This controversy depends upon the validity of these forfeiture proceedings. The supreme court of the state upheld their validity, and, consequently, awarded the half interest in controversy to the defendant Company.

These proceedings, as found by the state court, were as follows: Rufus Wilsey died insolvent in June, 1878, leaving a number of unpaid creditors; (Trans. p.11) on January 7, 1889, his co-locator, C. H. Havens, commenced the publication in the "Belt Herald" (a daily newspaper published in Lead City, South Dakota, and the newspaper published nearest the "Golden Sand" claim) of a notice of forfeiture, which notice was as follows:

"NOTICE OF FORFEITURE.

"To Rufus Wilsey, his heirs, administrators, and to all whom it may concern: You are hereby notified that I have expended $800 in labor and improvements upon the Golden Sand lode, said lode being described as follows: On the divide between the Middle Deadwood Gulch and a branch of Spearfish Creek, about 2,000 feet east of the Portland lode or deposit, about five miles from Poorman Gulch, the discovery shaft about 40 feet from Bear Gulch trail, supposed to be in Whitewood Quartz Mining District, in Lawrence County, D. T., as will appear by certificate filed on January 2, 1889, in the office of the Register of Deeds of said Lawrence County in order to hold said premises under the provisions of the laws of the United States and of this Territory, that being $100 per year, the amount required to hold the claim for the years ending December 31, 1880, December 31, 1881, December 31, 1882, December 31, 1883, December 31, 1884, December 31, 1885, December 31, 1886, and December 31, 1887. And if within ninety days after this notice by publication you fail or refuse to contribute your proportion ($400, being $50 for each of said years) your interest in said claim will become the property of the subscriber under Section 2324, Revised Statutes of the United States.

C. H. HAVENS."

This notice was published in each daily issue of the paper every day of the week, except Sunday, beginning Monday, January 7, 1889,and concluding Tuesday, April 2, 1889. (Trans. p. 14, fol. 23.)

During the period of its publication there was no administrator of the Wilsey estate, and his heirs (co-plaintiffs in error herein) were non-residents of Dakota.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of South Dakota erred:

(1) In holding that the published notice of forfeiture under Revised Statutes of the United States, Section

2324, addressed to "Rufus Wilsey, his heirs, administrators and to all whom it may concern" was sufficient to divest the title of plaintiffs in error, though said Wilsey was dead during the time of publication and there was no administrator of his estate.

(2) In holding that a notice of forfeiture under Revised Statutes of the United States, Sec. 2324, is sufficient to divest title of plaintiffs in error, though the same was published in a daily newspaper, and ninety (90) days had not expired between the first and last publication thereof, to-wit: Between January 7th, 1889, the first publication, and April 2nd, 1889, the last publication thereof.

(3) In affirming the second conclusion of law in the decision of the lower or circuit court of the State of South Dakota.

(4) In affirming the judgment rendered in the lower or circuit court of the State of South Dakota and in rendering judgment in favor of the defendants in error and against the plaintiffs in error.

I.

THE NOTICE OF FORFEITURE WAS INSUFFICIENTLY ADDRESSED.

Preliminarily, if there is any doubt as to the interpretation of the forfeiture provision of Section 2324, the statute should be construed strictly as against defendants because it is a statute of forfeiture.

"A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law."

Hammer vs. Garfield M. &. M. Co. 130 U. S 291.
S. C. 9 Sup. Ct. Rep. 549, 552.
Johnson vs. Young 24 Pac. Rep. 173 (Col.)
Quigley vs. Gillette 35 Pac. Rep. 1040 (Cal.)

"In an ex parte proceeding, as a sale of land for taxes,

under a special authority, great strictness is required. An individual cannot be devested of his property against his consent, until every substantial requisite of the law has been complied with."

Early vs. Doe, 16 How. (U. S.) 615-618.

Ronkendorff's Case, 4 Pet., 349.

Statutes providing for giving notice by publication are in derogation of common law and must be strictly construed.

16 Am. & Eng. Enc. Laws, page 817.

"Forfeitures are not favored in the law. Courts always incline against them."

Farmers, etc., Natl. Bank vs. Dearing, 91, U. S. 35.

Citing Marshall vs. Vicksburg, 15 Wall, 146.

This Court in construing this very statute under which defendants claim to have acquired Wilsey's title, (Rev. Stat. U. S., Sec. 2324), says: "Neither of these, however, made him a co-owner during the year 1884, within the meaning of the statute which, providing as it does for the forfeiture of the rights of a co-owner, should be strictly construed."

Turner vs. Sawyer, 150 U. S. 578; S. C. 14 Sup. Ct. Rep. 192.

The supreme court of Montana has recently held the same, treating the question entirely as one of forfeiture. After quoting the section of the statutes, the Court says: "This is a statute of forfeitures. That the forfeiture may be worked, the facts constituting it, or laying the foundation for it, must exist. The statute must be strictly construed," citing Turner vs. Sawyer, supra.

Brundy vs. Mayfield, 38 Pac. Rep. 1067, (Mont.)

(1.) The notice of forfeiture was addressed "To Rufus Wilsey, his heirs, administrator, and to all whom it may concern." Though nominally to both Wilsey and his heirs, etc., in reality it could only be notice to one or the other; not to both; since Wilsey could have no heirs or administrator until his death. *Nam nemo est haeres viventis* The notice must then be construed as given

either to Wilsey or to his heirs, administrator, etc. Under such circumstances, would it not be the reasonable, to say nothing of the strict, construction, to say that the notice is given to the one to whom it is definitely addressed by name, and not those indefinitely addressed by description only?

(2) But let it be assumed that the only definite part of this notice can be disregarded, or treated as surplusage, without doing violence to the rule of construction by which we must be governed. We are then confronted by the proposition, which we deem to be undoubted law, that the administrator of an insolvent estate is a necessary party to a complete determination of the title to real property belonging thereto. Otherwise creditors of the estate might be left without redress. Suppose the Wilsey heirs had by deed conveyed their interest in the Golden Sand to their co-tenant, Havens. Would the defendant contend that Havens would thereby acquire perfect title to the claim, divesting the administrator, and through him, the creditors of the estate, of the power of subjecting it to the payment of outstanding indebtedness? We hardly think so. Yet Havens could certainly acquire no greater rights by notice of forfeiture addressed solely to the heirs, than by deed signed solely by them. If Havens should bring an action against the heirs [illegible] to quiet his title, the decree could not possibly bind the administrator and prevent him from proceeding according to law to subject the property to the debts of the estate. Neither would this end be accomplished by notice of forfeiture. It is therefore plain that the administrator of an estate must be given notice, personally or by publication, before he, or creditors, can be bound. This was not done here, because even if a notice addressed to an administrator generally and not by name, is good, yet in this case there was no administrator, the former one having died in 1888.

In Billings vs. Aspen Co., a notice addressed to William J. Wood, or his administrator, was held to be nugatory, because Wood was dead, and the title which was

vested in his heirs could not be affected by a notice addressed to a dead man, or his administrator.

Billings. vs. Aspen Co., 51 Fed. Rep., 338.

(3) In the third place, not only the administrator but the heirs, of a deceased co-owner should be mentioned by name in a published notice of forfeiture. If the notice had been personally served on each party, it might with more reason be contended that it would not be so essential to insert the names of those intended to be affected. But if, in the absence of a statute expressly providing therefor, it is "due process of law" to divest one of property by a published notice directed to him generally as an "heir" it would seem to follow that a notice addressed simply "to whom it may concern" ought to be equally efficacious, and if that is sufficient, a published notice addressed to no one at all ought to be valid, because the presumption would be that it was only intended to affect those "whom it might concern." The result would be that every co-owner in a mining claim would be held to have notice, actual or constructive, of every notice of forfeiture published in his district, whether addressed to him, or to no one, and to be safe he would be compelled to actually read through all such notices in order to ascertain whether he was rightfully or wrongfully, sought to be affected thereby. Would this be a "strict construction" of the statute? On the contrary, could a more liberal construction be devised?

"One of the most important requisites of a service by publication is that it shall correctly state the parties to the suit, and that it shall correctly state the name of the defendant." Service upon the "Washington Trust Co., instead of the Washington Trust Co. of the City of New York," held invalid.

City of Detroit vs. Detroit City R. Co., 51 Fed. Rep., 9.

Notice to Grant B. Hunt instead of Garret B. Hunt, is insufficient.

Cotton vs. Rupert, 60 Mich. 318, S. C. 27. N. W., 520.

Judgment quieting title against Robert Brimford,

upon service by publication, is not good against Robert Binford.

Entreken vs. Chambers, 11 Kan., 368.

Service by publication addressed to "John McCorkle, —McCorkle, his wife" the husband being then dead, does not make his widow, Maria McCorkle, a party to the action.

Thompson vs. McCorkle, 34 N. E. Rep. 813, (Ind.)

"If, therefore, the heirs of L. Bleidorn had been named in the caption as defendants, and publication had been made for them by their proper names, such publication would have operated to make them parties as non-resident defendants;" but having been only described as "heirs of L. Bleidorn," the decree, as to them, was held a nullity.

Bleidorn vs. Pilot Mt. Co., 15 S. W. Rep. 737, (Tenn.)

Under a statute providing that "an order directed to the non-residents or absentees" shall be made, it was held: "This section of course means that the names of these non-residents or absentees shall be specified in the order. In no other conceivable way could the order be 'directed' to them."

Troyer vs. Wood, 10 S. W. Rep. 43, (Mo.)

"In the case of substituted service, or service by publication, no one is served who is not named, or what amounts to the same thing, who is incorrectly named; while in case of personal service, the right party is actually served by delivery of the writ, though he is not correctly named therein."

Chamberlain vs. Blogett, 10 S. W. Rep. 44, (Mo.)

A citation supporting judgment for taxes, addressed to the heirs of a certain person, held insufficient for not mentioning the names of such heirs.

New Orleans vs. St. Romes, 28 La. Ann. 17.

None of the cases relied upon by defendants in support of the theory that a general notice is good are in point. All such cases belong to one of two classes; either

the statute is held to expressly authorize such notice, or the court has already acquired jurisdiction of the thing, the proceeding being in the nature of one *in rem*.

(4) "If the facts in this case had been that the notices were wholly true, that the necessary facts were all present, that the notices were regular and formal in their matter and service, then an important and interesting question would have been presented to us; that is to say, whether, if the full requirements of the forfeiture notice of section 2324 are strictly complied with, there is a forfeiture worked and a transfer of title accomplished, *ipsis fatic*, or must the forfeiture be declared and adjudged by some appropriate action?"

Brundy vs. Mayfield, 38 Pac. Rep. 1069, (Mont.)

II.

THE NOTICE OF FORFEITURE WAS INSUFFICIENTLY PUBLISHED.

The notice of forfeiture in this case, was published in a daily paper, beginning Monday, Jan. 7, 1889, and concluding Tuesday, April 2, 1889, and no more. A period of but eighty-five days.

The statue requires the co-owner, who has performed the necessary annual representation work on a mining claim, to give his delinquent co-owner "Notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, etc."

Rev. Stats. U. S. Sec. 2324.

The question is:—Is a publication once each day, (Sundays excepted,) for eighty-five days, a publication "for at least once a week for ninety days?"

Had the statute read, "at least once a week in thirteen weeks," the publication would clearly have been sufficient.

Had it read, "at least once a week for thirteen weeks," there would have been some ground to contend for its sufficiency.

But reading as it does, "at least once a week for ninety days," it must mean something different from either of the foregoing phrases; otherwise one of those phrases would have been used by Congress.

To hold for defendants, it is absolutely essential to hold that "once a week for ninety days" means the same thing as "once a week in thirteen weeks," since the notice in question was only published twice, (on Monday and Tuesday,) in the thirteenth week; the last publication having been made five days before the expiration of ninety days from the first publication.

In other words, to hold for defendants, it is necessary to say that a publication once each day for eighty-five days, is the same thing as a publication, "once a week for ninety days."

To hold for defendants, it is necessary to hold that the phrase "for ninety days" is modified and changed in its meaning, by the phrase "once each week."

The statute requires that the notice should be published for "ninety days;" the fact that it must be published at least once each week does not make the duration of the entire publication any less.

Suppose the statute had simply required publication for ninety days. Could it be contended that a weekly monthly or daily publication covering but eighty-five days, between the first and last publications, would suffice?

A publication in each one of thirteen weeks is not a publication "for", or during, ninety days. If it is, then a publication in each one of three months, would be a publication for ninety days, though the first and last publications might not be more than sixty days apart.

If a publication in one week is equivalent to a publication for seven days, as defendants contend, then why is not a publication in one month equivalent to a publication for thirty days, or a publication in one year equivalent to a publication for 365 days?

The simple answer is, because the statute does not so provide: the statute does not provide that a publication "at least once a week," shall be equivalent to a publication for seven days, or that a publication eighty-six times in thirteen weeks, (as in the case at bar,) shall be the same thing as a publication "for ninety days."

The publication must be for ninety days; the fact that it need only be made once a week, does not lessen the number of days over which it must extend, nor enable the last publication to continue as a publication for five days after it has been completed.

Authorities.

A statute required that public notice of the time and place of sale should be given "by advertisement, once in each week, for at least twelve successive weeks." This Court held that the first notice must precede the sale eighty-four days. "The notice for sale, in this instance, was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words 'once a week," which precede in this statute those which follow them "for at least twelve successive weeks."

Early vs. Doe, 16 How. (U. S.) 617.

The United States Circuit Court of Appeals for this circuit, recently had before it a similar question. A statute provided that no sale should be had "without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale." The court said:—"In this act of Congress the preposition 'for' in the clause 'for at least four weeks,' as is often the case when it is used with relation to periods of time, clearly means 'during,' or 'during the continuance of.'" The Court therefore concluded that the publication of a notice of sale once a week for only 27 days before the day of sale is not a previous publication of such a notice 'once a week for at least four weeks prior to such sale."

Wilson vs. Northwestern Mut. Ins. Co., 12 C. C. A., 505; S. C. 65, Fed. Rep. 38.

The supreme court of North Dakota, in construing a statute requiring that notice be given "by publishing the same for six successive weeks, at least once in each week," said, "The word 'for' in this statute means 'throughout,' or 'during the continuance of'. It is obvious that a notice of sale has not been published during the continuance of a week, when the day of sale follows the day of publication at an interval of less than a week. * * If the statute had declared that the notice should be published once a week in each of six successive weeks, its meaning would have been different. But it does not so declare. Its explicit provision is that the notice shall be published for six successive weeks."

Finlayson vs. Peterson, 67 N. W. Rep. 954, (N. D.)

To the same effect are the following cases also:

Bacon vs. Kennedy, 56 Mich. 329 (22 N. W. Rep. 824.)

Pratt vs. Tinkcom, 21 Minn. 142-6.

Boyd vs. McFarlin, 58 Ga. 208.

Ogden vs. Walker, 59 Ind. 460-6.

Security Co. vs. Arbuckle, 24 N. E. Rep., 329, (Ind.)

Smith vs. Rowles, 85 Ind. 265.

Market Nat'l Bank vs. Bank, 89 N. Y. 398.

Application of Authorities.

In all the foregoing cases the object of the statute was to give notice of some definite event to occur at a fixed time subsequent to the notice; that is, of some definite event to occur in the future, such as a mortgage sale; and it was held that the entire specified time should elapse between the first publication and the future event, of which notice was required to be given.

The case at bar differs from the foregoing cases in that the statute now under consideration requires notice to be published during a specified time of an event that has already occurred; the notice is to be given of something which is in the past; which transpired prior to the notice; to-wit, the completed performance of the work by the advertising co-owner and the failure to contribute on the part of the delinquent, followed by a statement of the legal effect of continued delinquency.

In such a case there can be no room for respondents contention that the last publication continues as a publication for five days subsequent to its actual appearance; since it is not a definite event occurring thereafter, of which notice is given, but a condition or state of affars existing theretofore, and at the time of the notice. Notice of a past event or present condition cannot be given by publication "for ninety days," or during the continuance of ninety days, unless that period of time is actually covered by the publication; that is unless ninety days elapse between the first and last publication; whereas ninety days' notice of a future definite event might be given by one publication only, providing it were made ninety days prior to the event.

Furthermore the statutes in all the foregoing cases required a publication once in each week for a certain number of weeks; therefore a publication in one week might well be held to continue throughout that week, and last for the six days immediately following; but where a publication is requred once in each week for a given number of days, it cannot be held that the last publication extends or continues for any number of days after its completion. It is a publication for the day only on which it is made.

In the language of the North Dakota supreme court "if the statute had declared that the notice should be published once a week in each of six (thirteen) successive weeks, its meaning would have been different. But it does not so declare."

Finlayson vs. Peterson, 67 N. W. Rep. 954 (N. D.)

Defendants' whole contention resolves itself into the proposition that the phrase "at least once a week," modifies and changes the meaning of the phrase "for ninety days." This is clearly unfounded. The statute requires that the publication be "for ninety days;" this requirement is just as clear and explicit as though the phrase "at least once a week" had not been used. Now if the phrase "at least once a week" had not been used it would be self-evident that a publication for eighty-five days was not one

for ninety days. There would be no possibility for respondent's contention that the publication made on April 1st, lasted for a week after its actual appearance. As we have said, such a contention can only be based upon the implication, or assumption that the clause "at least once a week" in some way limits or lessens, or qualifies the requirement that the publication shall be "for ninety days." But this is impossible. The requirement that the notice shall appear at least once a week is wholly concerned with the frequency of the publication; it has nothing to do whatever with its duration, which remains unmodified and unchanged; it must still be "for ninety days," though it need only be once a week during that time.

The phrase in question specifies how often the notice must appear between the first and last publications; but it does not specify how long a time must elapse between those two dates; it is a requirement as to number of times and not as to length of time.

Defendant's Authorities.

None of defendants' authorities are in point, since none of them construe a statute requiring notice of a past event or present condition, once a week for a stated number of days.

Ronkendorff vs. Taylor's Lessee, 4 Pet. 349, required advertisement of time and place of a tax sale, once a week for three months. The court simply held that the publication need not be on the same day in each week; "if published once a week, for three months, the law is complied with, and its object effected."

In State of Nevada vs. Yellow Jacket Co., 5 Nev. 422, 436, the statute required notice of an election to be published "once a week for three weeks." The court held that the statute required but three publications of the notice, and that its full purpose was accomplished upon the expiration of the third day of publication, even though 21 days had not elapsed between the first publication and the day of election. The court expressly distinguished the case from one such as is here under consideration, by

saying: "Some statutes require a publication for a definite period of time, or a certain number of days, and in such case of course the advertisement must be for the full period." (p. 422.)

Justice Johnson dissented from the majority opinion, giving an elaborate review of authority in support of his dissent. (5 Nev. p. 425.)

In Wood vs. Knapp, 100 N. Y. 110, a notice of sale was required to be published "for the space of ten weeks." There were ten weekly publications, the first of which was sixteen weeks prior to date of sale. There was also a statute prescribing that the "time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen or which completes the full period of publication." The publication in question was held to fully comply with this rule.

Raum vs. Leech, 54 N. W. Rep. 1058 (Minn.) holds that under a statute requiring publication "once in each week for six consecutive weeks," it is not necessary that each publication be on the same day of the week.

Bachelor vs. Bachelor, 1 Mass. 256, required publication "three weeks successively."

In Steinle vs. Bell, 12 Abb. Pr. (N. S.) 176, the requirement was "once each week for six weeks."

In Knowlton vs. Knowlton, 39 N. E. Rep. 595, (Ill.) an attack was made upon the judgment of a Connecticut Court of general jurisdiction, on the ground that process was not published as required by order of the Connecticut Court "for two weeks successively before the term of the court to which the same was made returnable." The Illinois Court stated that "the order is probably susceptible of either of two constructions—the one demanding the lapse of two full weeks; the other only calling for publication once in each of two successive weeks; this latter was evidently the construction placed upon the order by the Connecticut Court;" and the Illinois Court adopted the Connecticut Court's construction.

In Martin vs. Hawkins, 35 S. W. Rep. 1104, (Ark.) the statute required notice of application for confirmation of a tax title to be "published six weeks in succession" six months before the beginning of the term at which the petition was to be heard. The notice was published by six successive weekly insertions, and the last publication was more than six months and seven days prior to the beginning of the term. It was held sufficient.

In Olcott vs. Robinson, 21 N. Y., 150, (in which there was a dissenting opinion,)notice of execution sale was required to be printed "once in each week, for six weeks successively."

The statute was the same in Wood vs. Morehouse, 45 N. Y. 368.

Both of these case are opposed to the decision of the U. S. Court of Appeals for this circuit and to the decision of the Supreme Court of North Dakota, supra.

In none of the foregoing cases and in none of those cited by defendants, so far as we are aware, was the decision based upon a statute requiring weekly publications for a certain period of days; and in all of them the notice required was of a future definite event.

They are not, therefore, of material assistance in the decision of this case.

If the matter were still left in doubt, the fact that it is a statute of forfeiture which is under consideration should decide the controversy in appellant's favor.

Decision of State Supreme Court.

The Supreme Court of the State in its decision on this point, (transcript p. 21.) makes no distinction in meaning between the phrases "at least once a week in thirteen weeks," and "once a week for ninety days."

Had Congress intended that a publication once a week for, or in, each one of thirteen weeks should be sufficient, it would certainly have used the obvious and common expression "at least once a week for (or in) thirteen weeks"; that it has not used this obvious ex-

pression; an expression which would immediately occur to anyone in attempting to formulate the idea embodied in the lower court's opinion, and the only expression which does really embody that idea,—Congress has, apparently, gone out of its way and used a wholly different phrase, to-wit:—"at least once a week for ninety days."

One of two things is, therefore, perfectly apparent,—either Congress has bungled in its use of language,—employing an inapt and uncommon phrase to express an idea which would naturally be formulated in a common and most obvious phrase,—or else by the employment of this peculiar language it meant some thing different from what would have been conveyed had the other expression been used. Of course, the courts are bound to take the second horn of this dilemma if it is possible; they are bound to presume that "at least once a week for ninety days" means something different from "at least once a week for thirteen weeks," if that presumption is consistent with any reasonable interpretation. They are bound to presume that different language conveys a different meaning; that different phrases mean different things; that Congress had a different intent when it said "at least once a week for ninety days" than it would have had if it had said "at least once a week for thirteen weeks." This presumption the state court clearly failed to indulge.

2. The state court has further fallen into the error of assuming that the phrase "at least once a week" qualifies, or in some way modifies the phrase "for ninety days." This is made perfectly clear by the following considerations: Suppose the statute had been worded that the notice should be "published for ninety days," omitting therefrom the phrase "at least once a week." Would any man contend that if the statute read in this way, a publication once a week in each of thirteen weeks,—but covering a period between the first and last publications of only eighty-five days, would comply with the statute? The

only basis for such an interpretation must, therefore, be the phrase "at least once a week" which is thereby given a qualifying and modifying effect upon the phrase "for ninety days." Indeed, it is apparent from the opinion itself of the State Court that its decision is controlled by and wholly based upon the phrase "at least once a week." The Court in its opinion says: "The publication on Monday, January 7th, was sufficient for the week beginning on that day." In other words, the Court assumes that one publication is notice for seven days. In this, we think, the Court is in error: first,--because of the reason of the thing; and, second--because of authority. Upon reason the phrase "at least once a week" simply specifies how often the notice must appear between the first and last publication. It has nothing whatever to do as to how long a time must elapse between those two dates;--it is solely a requirement as to the number of times of publication, and no requirement whatever as to the length of time thereof. The Court in its opinion, however, assumes that because the notice is required to be published at least "once a week" (a requirement as to number of times only) it, therefore, follows that a publication once in a week is a publication for seven days. It seems to us that this is necessarily a *non sequitur*,--that a requirement as to how often the notice must be published during a given length of time, cannot possibly be construed as having anything to do with the length of publication. A publication for one day certainly is not alone and of itself a publication for seven days. A publication once in a week certainly is not alone and of itself a publication for one week. Neither is a publication once each week for thirteen weeks (eighty-five days only expiring between the first and last publication) a publication for ninety days. Second: Upon the authority of this Honorable Court (a case which was not noticed by the State Court in its opinion) we think its decision is likewise erroneous. In

Early vs. Doe, 16 How. (U. S.) 617.

a statute required that public notice of the time

and place of sale should be given by advertisement once in each week for at least twelve successive weeks. The Supreme Court held that the first notice must precede the sale eighty-four days. "The notice for sale, in this instance, was the fact which was to precede the time for sale, and that is neither qualified nor in any way lessened by the words 'once a week' which precede in this statute those which follow them, 'for at least twelve successive weeks.'"

For the foregoing reasons we submit that the decision of the Supreme Court of the State of South Dakota is erroneous and should be reversed.

EBEN W. MARTIN,
NORMAN T. MASON,
Attorneys for Plaintiffs in Error.

Deadwood, S. D., November, 1903.